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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 vs.

13 MATTHEW CHARLES KENNEDY, et. al.

14 Defendants.

) Criminal Case No.: 08CR0650JM

) Magistrate Case No.: 08MJ0569

)  
) **POINTS AND AUTHORITIES IN**  
) **SUPPORT OF MATERIAL WITNESS'**  
) **MOTION FOR VIDEOTAPE**  
) **DEPOSITION AND REQUEST FOR**  
) **STATEMENT OF REASONS IN**  
) **SUPPORT OF CUSTODY**

) **DATE: March 25, 2008**

) **TIME: 9:30 am**

) **HON.: NITA L. STORMES**  
)  
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19 Material Witnesses, SIMON FELIX-COMPANA, DEMITRO SANTIAGO-

20 SANTIAGO AND PEDRO SANTOS-PERALTA (hereafter "Material Witnesses") by

21 and through their counsel, Linda A. King, submit the following Memorandum of Points

22 and Authorities in support of their motion to take their videotape deposition.  
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**I****INTRODUCTION**

On or about February 27, 2008 the Material Witnesses were detained by the Immigration and Naturalization Service in connection with the arrest of Matthew Charles Kennedy, the defendant in the above-entitled case. The defendant has been charged with illegally bringing in undocumented aliens in violation of 8 U.S.C. § 1324 and the Material Witnesses, who were in the car with the defendant at the time of his arrest, have been detained as a Material Witnesses under 8 U.S.C. § 1227 (d).

The Material Witnesses are being held at Metropolitan Correction Center. They are unable to locate anyone in this country to be their surety and post the bond, which would allow for their release.

It is unnecessary to keep the Material Witnesses in the United States because their testimony can be preserved through the use of videotape depositions.<sup>1</sup> The Material Witnesses therefore request a court order that their testimony be preserved through the use of videotape deposition and, thereafter, that they be allowed to return to their family in Mexico.

**II****THE TESTIMONY OF THE MATERIAL WITNESS CAN BE  
SECURED BY VIDEOTAPE DEPOSITION AND THERE IS NO  
COMPELLING REASON TO KEEP HIM IN CUSTODY**

Title 18, section 3144 of the United States Code Provides:

No Material Witness may be detained . . . if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.

1 While a witness may be detained for a reasonable period of time, the court must  
 2 vigilantly guard an undocumented alien's "overriding liberty interest" and schedule a  
 3 videotape deposition at the earliest possible time. See, Aguilar-Ayala v. Ruiz 973 F. 2d  
 4 411, 419 (5<sup>th</sup> Cir. 1992).  
 5 Deposition of the Material Witness may be used at trial in criminal cases, so it is only in  
 6 *exceptional circumstances*, where the interests of justice will be denied, that a videotape  
 7 deposition is not appropriate. See, Torres-Ruiz v. United States 120 F.3d 933 (9<sup>th</sup> Cir.  
 8 1997) [citing Aguilar Ayala v. Ruiz 973 F.2d 411, 413 (5<sup>th</sup> Cir. 1992) see also 8 U.S.C.  
 9 § 1324 (d), Federal Rules of Evidence 804, and Federal Rules of Criminal Procedure 15.  
 10 Defendant may be present at the videotape deposition and therefore have a full and fair  
 11 opportunity to cross-examine the witness. The videotape provides sufficient indicia of  
 12 reliability to afford the trier of fact a satisfactory basis for evaluation the truth of a  
 13 statement. Dutton v. Evans 400 U.S. 74, 89 (1970).

14 The government or defendant can effectuate the detention of the material witness  
 15 upon a showing that (1) the material witness will, in all likelihood, be unavailable to  
 16 testify for trial, and (2) that the use of deposition testimony will deny the defendant a fair  
 17 trial and that live testimony would somehow be significantly different. See, Aguilar-  
 18 Ayala v. Ruiz 973 F.2d at 413 (5<sup>th</sup> Cir. 1992), United States v. Humberto Rivera 859  
 19 F.2d 1204, 1208 (4<sup>th</sup> Cir. 1988). That would be a difficult burden in this case, however,  
 20 because the Material Witnesses has indicated they are willing to return for trial if the  
 21 government makes arrangements for their legal re-entry into the country and provides  
 22 travel expenses. <sup>2</sup> (King Decl. At para. 6).

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 25 <sup>2</sup> The government would undoubtedly take reasonable steps in this case, as it has in  
 26 other similar cases, to secure the witness's testimony at trial by personally subpoenaing  
 27 the witness, providing travel costs, and arranging for legal re-entry of the alien. (See,  
 28 United States v. Eufracio-Torris 890 F.2d 266, 270 (10<sup>th</sup> Cir. 1989) cert. Denied 494

1 U.S. 1008 (1990) [government need not guarantee the witness will be available, only that  
2 they use good-faith efforts to secure their presence at trial]; see also, Ohio v. Roberts 448  
3 U.S. 56, 65 (1980) [so long as the government uses reasonable measures to secure a  
4 witness at trial, a deposition is admissible over a defendant's Confrontation Clause and  
5 hearsay objections].

6 The Material Witnesses should not be detained because their testimony can be adequately  
7 secured by deposition. This is a very routine alien smuggling case. Based on interviews  
8 with the Material Witnesses and the report submitted by the arresting agency, the facts to  
9 which the Material Witnesses are competent to testify are straightforward. (King Decl.  
10 At para. 5).

11 Moreover, neither the Material Witnesses nor their counsel has been informed that  
12 the witness' detention is necessary to prevent a failure of justice. (King Decl. At para. 4).  
13 Quite to the contrary, the witnesses have already spent a considerable time in jail and it is  
14 very important that they be released as soon as possible so that they may be reunited with  
15 their family in Mexico. (King Decl. At para. 3.)

16 For these reasons, the Material Witnesses request that the court immediately  
17 orders the taking of their videotape depositions and that they thereafter are immediately  
18 returned to their country of origin.

### 19 III

20 **IF THE COURT DENIES THE MATERIAL WITNESS REQUEST TO**  
21 **TAKE HIS VIDEOTAPE DEPOSITION, HE MAY REQUEST THAT THE**  
22 **GOVERNMENT PROVIDE HIM WITH A STATEMENT OF REASONS WHY**  
**HE HAS TO REMAIN IN CUSTODY**

23 Where a witness has been held in custody for more than 10 days, the government  
24 has an obligation to prepare a biweekly report stating the reasons why such witness  
25 should not be released with or without the taking of a deposition. Fed Rules Crim. Proc.,  
26 Rule 46 (g).  
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1 The Material Witnesses are not aware of the any reasons why they should remain  
2 in custody, but to the extent the government knows of any such reason, they hereby  
3 request that the government provide them with a copy of a biweekly written report  
4 indicating these reasons.  
5

6 IV

7 CONCLUSION

8 For the forgoing reasons, the Material Witnesses respectfully request that the  
9 motion for the taking of a videotaped deposition be granted. In the alternative, the  
10 Witnesses request that they immediately be provided with a statement of reasons why  
11 they needs to remain in custody.  
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14 Date: March 13, 2008

  
Linda A. King  
Attorney for Material Witnesses